No. 12662

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOSEPH DENUNZIO FRUIT COMPANY, a corporation,

Appellant and Cross-Appellee,

vs.

RAYMOND M. CRANE, doing business as ASSOCIATED FRUIT DISTRIBUTERS,

Appellee and Cross-Appellant,

JOHN C. KAZANJIAN, doing business as RED LION PACKING COMPANY, a corporation,

Appellee.

BRIEF OF APPELLEE JOSEPH DENUNZIO FRUIT COMPANY.

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BRIEF OF APPELLEE JOSEPH DENUNZIO FRUIT COMPANY.

Basis of Appellant Crane's Appeal.

As an appellant, Raymond M. Crane, doing business as Associated Fruit Distributors, hereinafter referred to as "Crane," takes the position that he was acting as buying agent or procuring broker for Joseph Denunzio Fruit Company, hereinafter referred to as "Denunzio," and that therefore he is not liable to Denunzio for Kazanjian's failure to deliver under the alleged contract. In other words, he takes the position that Denunzio acted through two agents—Rains and Crane—and that Kazanjian acted through none. Crane was not successful in this position either before the Department of Agriculture or in the court below.

Holding of the District Court on Appellant Crane's Contention.

Regarding this contention of Crane, Judge O'Connor made the following finding [Finding V, Sub. 4, Tr. p. 147]:

> "At no time material herein, was Crane the buying broker for Denunzio through Rains."

In his opinion, Judge O'Connor was even more specific on this point. He stated as follows:

> "The evidence is clear and convincing that during all the time these negotiations for the sale and purchase of grapes were in progress between Crane and Rains, Rains was acting exclusively as the buyer's agent for Joseph Denunzio, and did not know that Crane was acting for an undisclosed principal, John C. Kazanjian, until the time of the repudiation of the contract by the Red Lion Packing Company, as principal, on October 10, 1944, and by Crane on October 10, 1944, or at the earliest on October 3, 1944.
>
> "Furthermore, Crane and Rains, instead of functioning in a fiduciary relationship, *inter se,* were at all times dealing with each other at arm's length, each attempting to make the best deal possible for his client; and for Raymond M. Crane to now take the position that he was the buying agent or broker for Joseph Denunzio through A. B. Rains, Jr. during the foregoing negotiations leading up to the consummation of this contract, is fantastic and taxes the credulity of the court. There is no creditable evidence in this case to support such a contention." [Tr. p. 116.]

Wording of Original Telegram Shows Crane Was Agent of Seller.

It is the contention of Crane that the original night letter, dated September 26, 1944 [Tr. p. 70], shows that Crane was the buying broker or procuring broker rather than the broker for the seller. An examination of the wording of this night letter does not support this contention.

The night letter starts in by stating that Crane "can book Emperors." Crane argues that this verbiage shows an offer to act for a prospective purchaser. As pointed out by Judge O'Connor in his opinion, however, the word "book" used as a verb means to bind, to promise or to pledge oneself, or to make an engagement. And in *Barteldes Seed Co. v. Fox,* 134 Okla. 248, 273 Pac. 258 at page 260, a letter from plaintiff to defendant, reciting "we have booked your order for alfalfa and Sudan grass seed . . . and thank you very much for the same," was held to constitute an acceptance of the order. When Crane used the words "can book Emperors" he stated in effect that he could pledge himself to deliver Emperor grapes. Such language is not the language of a person seeking to put his services at the disposal of a buyer.

Furthermore, in this first night letter, Crane states that the price is "2.53 net to shipper which ceiling that time." The transaction was of such a nature that the applicable ceiling price was $2.53 per lug rather than $2.50 per lug. An examination of MPR 426, Amendment 46, which was the maximum price regulation in force at the time, shows that a ceiling of $2.53 per lug was the ceiling price when the seller was acting through a broker or carlot distributor. In other words, Crane considered himself the agent of the seller; otherwise, he would not have set forth

the ceiling price to have been $2.53 per lug—the ceiling price when the seller had an agent or broker.

A further examination of this original night letter of September 26, 1944, will show that Crane ended the portion of the telegram referring to Emperor grapes with the speedkode phrase "ADLAM" which means "offered subject to confirmation." The original telegram, then, sent by Crane after conferring with Kazanjian, used words definitely offering the grapes for sale.

Wording of All Telegrams Show Arm's Length Transaction Between Crane and Rains.

A reading of all of the telegrams passing between Rains and Crane shows an arm's length transaction in which Crane is endeavoring to sell both grapes and tomatoes to Rains and others. After Crane and Rains had finally completed the transaction for the Emperor grapes, Crane, in the same teletype, states: "What about tomatoes—first car arrived Kansas City—etc." Having made a sale in grapes, Crane was proceeding immediately to try and make a sale in tomatoes.

It will be noted that the language in the telegrams and teletypes exchanged between Rains and Crane is very different from the language in comparable correspondence between a principal and his agent. For example, Crane cites a case in 5 Agricultural Decisions 646 in which the broker was held to be the agent of the buyer and not the seller but the telegram from the broker to the buyer in that case reads as follows:

> "As per your telephone instructions I have purchased for your account small load due early morning A. M."

There can be no question that the above quotation is the language of agency, but it is quite different from the language used between Crane and Rains in the instant case.

Discussion of Cases Cited by Crane in His Opening Brief.

5 A. D. 646, cited by Crane has already been discussed in this brief.

Appellant Crane cites 6 Agricultural Decisions 928. The headnote of that case reads as follows:

> "Principal and Agent—failure to prove agency. Where complainant alleged in its complaint involving the alleged rejection of a shipment of lettuce, that one of two respondents acted in the transaction as agent of the other respondent, and this allegation is denied by both respondents who in turn aver that the agent acted solely as agent of the complainant who was to pay the brokerage, and the record contains a letter to the Department from the complainant which in effect confirms the contention of the respondents, it is concluded that complainant considered the said respondent as its agent and expected to pay the brokerage charges."

From the above, it is apparent that the determining evidence of who the broker represented was the letter of complainant admitting that the broker represented it. The person who employed the broker would then be liable for the brokerage in the absence of an agreement to the contrary.

In the case of *Adams & Dodge v. Joseph Martinelli & Co.,* 6 Agricultural Decisions 1018, there was only one agent D'Arrigo Bros. This case is not the same as the

instant one where Denunzio had his agent in Louisville and Kazanjian had his agent in California. In that case, the finding of fact simply was to the effect that the Martinelli Co. had authorized D'Arrigo to purchase the onions for it.

Crane quotes from the case of *W. H. Russum v. Schowker Bros.,* 6 Agricultural Decisions 583. The only relevant portion of the case is that quoted to the effect that where an offer is made by a buyer to a broker who transmits it to the seller, the buyer thereby makes the broker his agent, at least for the purpose of transmitting such offer to the seller. In the instant case, however, it will be noted that the offer came originally from the seller through the broker and the seller therefore made the broker his agent for the purpose of transmitting the offer. The original night letter was an offer at the price of $2.53 per lug. Later there was an offer at $2.50 per lug. Both of these originated with the seller, they were accepted by the buyer's agent Rains and then confirmed by the seller's agent Crane.

In *Barker-Miller Distributing Co. v. Berman,* 8 Fed. Supp. 60, there was an agreement between Robert Berman in Phoenix and the Barker-Miller Company of Phoenix that one Comer would purchase carloads of melons in Imperial Valley. Under this agreement, Comer, as the regular agent for the Barker-Miller Company, would send the bills of lading for the purchased melons to Phoenix where Berman would reimburse the Barker-Miller Company. In other words, here was a transaction in which Comer was the known agent of the Barker-Miller Company; Berman employed the Barker-Miller Company to make the purchases, and it in turn acted through its agent Comer. In the instant case, if Crane

had been the regular agent of Rains and Denunzio had dealt with Rains with the knowledge or agreement that Rains in turn would deal through his agent Crane, we would have a situation parallel to the *Barker-Miller* case. But in the instant case, Denunzio had not authorized Rains to employ Crane as an agent and neither Denunzio or Rains intended that Crane act as its, his or their agent.

A Broker Is the Agent of the Party First Employing Him.

The proper test to determine whether a broker is the agent of the seller or the buyer is to determine who first employed the agent. The person who pays the broker is not necessarily the principal of the broker; by contract the parties may provide that either the purchaser or the seller pay the broker, irrespective of which party the broker represents.

A good general statement of the law on this point is set forth in 12 C. J. S. at page 36, as follows:

> "Primarily a broker employed in a particular transaction is the agent of the party who first employs him." (Citing *Stephens v. Ahrens,* 179 Cal. 743, 178 Pac. 863, and *Carothers v. Caine,* 38 Cal. App. 71, 175 Pac. 478.)

In 12 C. J. S. at page 179, the law is further set forth as follows:

> "The adverse party may be liable for the brokerage if liability is imposed upon him by contract." (Citing *Hutchon v. Rose,* 130 Cal. App. 735, 20 P. 2d 357, and *Calhoun v. Downs,* 211 Cal. 766, 297 Pac. 548.)

In *Calhoun v. Downs (supra),* the defendant Downs desired to sell certain real property and, according to the allegations of the complaint, employed the plaintiff Calhoun as a broker to sell the property. The plaintiff procured the defendant Ahlborn to purchase the property and an agreement to purchase and sell was entered into. Subsequently, the defendant Ahlborn entered into an agreement with the defendant Downs whereby the property was to be sold to him without any provision being made for payment of commission to the plaintiff broker but the defendant Ahlborn agreed to pay any commission that might be payable out of the transaction. The demurrer of the defendants to the complaint was sustained, but on appeal this was reversed. In particular, the court held that the defendant Ahlborn was liable for the payment of this brokerage because of his specific contractual obligation to pay and this even though there was no contention but what the plaintiff was the broker for the seller rather than for the purchaser the defendant Ahlborn. The court, at page 770, states:

> "Furthermore, in the second agreement, being the agreement of date June 1, 1926, as we have seen, Ahlborn agreed to pay any commission which might be claimed by any person 'because of the sale of the herein described property.' It is true that this agreement was not made with the plaintiff. It cannot be said, however, that it was not made for his benefit. If made for his benefit, although he was not a party to the agreement, he may recover thereon."

In the instant case, we do not have to go as far as in the case of *Calhoun v. Downs*. In the instant case, the agreement to pay the brokerage was actually made with the broker Crane. When such a specific contractual agreement is entered into, then Denunzio would be liable for the commission, if the broker performed, even though the broker was the agent of the seller Kazanjian.

In summary then, the broker is not the agent of the person who agrees to pay him his commission, as either party by written agreement can assume this obligation, but he is the agent of the party who first employs him. In the instant case, the findings are crystal clear that the seller, Kazanjian, was the person who first employed the broker Crane. The Secretary of Agriculture found that Crane was first contacted by Kazanjian who "on or about September 26, 1944, advised (Crane) that he had some grapes to offer for sale." [Tr. p. 70.] The Secretary thereupon goes on to find that "thereafter this witness (Crane) carried on teletype and telegraphic correspondence with Mr. Rains." [Tr. p. 70.]

The court in its findings [II, Subsec. 1, Tr. p. 172] found that "Crane, without prior solicitation from Rains, sent Rains (and others) a telegraphic offer on September 26, 1944, offering to book nine cars of Emperor grapes U. S. #1. . . ."

All findings have been unvarying that it was Kazanjian who originally communicated with Crane regarding the sale of these grapes and that thereafter Crane com-

municated with other brokers, including Rains, offering these grapes for sale. Under these circumstances, it appears clear that Crane was the broker for Kazanjian, although by contract he specified that his commission be paid by the other party. This he was able to do because it was a seller's rather than a buyer's market.

Respectfully submitted,

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